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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

NETWORK-1 TECHNOLOGIES, INC., a Delaware Corporation,	)	
Plaintiff,	)	
	)	C.A. No. 22-1319(MN)
v.	)	C.A. No. 22-1321(MN)
FORTINET, INC., and UBIQUITI, INC.,	)	
Defendants.	)	

Friday, June 23, 2023
10:00 a.m.
Oral Argument

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE MARYELLEN NOREIKA
United States District Court Judge

APPEARANCES:

FARNAN LLP
BY: MICHAEL J. FARNAN, ESQ.

Counsel for the Plaintiff

DUANE MORRIS LLP
BY: MONTE TERRELL SQUIRE, ESQ.
BY: DAVID DOTSON, ESQ.
BY: BRIANNA VINCI, ESQ.

Counsel for the Defendant
Fortinet, Inc.

APPEARANCES (Cont'd):

FISH & RICHARDSON, P.C.
BY: JEREMY ANDERSON, ESQ.
BY: DAVID CONRAD, ESQ.
BY: RILEY GREEN, ESQ.

Counsel for the Defendant
Ubiquiti, Inc.

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09:46:12 THE COURT: All right. Good morning, everyone. Please be seated.

10:04:24 Mr. Farnan, I don't think we need an introduction from you. You seem alone.

10:04:26 Who is on the other side.

10:04:31 Hi, Mr. Squire.

10:04:33 MR. SQUIRE: Good morning, Your Honor. Monte Squire on behalf of defendant, Fortinet. And I'm joined at the counsel table with my colleague, David Dotson from our Duane Morris Atlanta office, and my other colleague, Brianna Vinci from our Philadelphia office. And David Dotson will be leading the argument.

10:04:55 THE COURT: Who is everyone else here? Oh, I forgot, we have Ubiquiti.

10:05:05 MR. ANDERSON: We have a second defendant, Your

10:05:06 Honor.

THE COURT: I didn't mean to pin that all on you, Mr. Squire.

MR. SQUIRE: I understand, Your Honor.

MR. ANDERSON: Jeremy Anderson on behalf of the defendant, Ubiquiti. With me is my colleague, David Conrad from our Dallas office and as well as Riley Green from our Dallas office. And Mr. Conrad will be addressing the Court today.

THE COURT: So I have reviewed the papers and I have carefully read the complaint. And I'll hear from the defendants.

MR. DOTSON: May it please the Court, David Dotson, Your Honor, with Duane Morris representing Fortinet. And I will be addressing, or trying to address, all the common issues among the defendants and then obviously the Fortinet specific issues. Mr. Conrad will jump in after me if that's okay with Your Honor.

And we would like to reserve a couple of minutes for reply, if that's okay with Your Honor.

THE COURT: Sure.

MR. DOTSON: The first point I wanted to make, plaintiff has obviously not opposed our motion as to willful infringement, so we're only dealing with the indirect infringement allegations.

10:06:26 And just to provide a little bit of background
10:06:28 that I think is important as we walk through these issues,
10:06:30 the patent-in-suit is one patent, the '930 patent.
10:06:34 Plaintiff's allegations are that that patent reads on the
10:06:38 IEEE Power over Ethernet, or PoE as it's referred to by
10:06:44 industry standards. And those components with respect to
10:06:49 the defendants' products, that's a chipset that defendants
10:06:53 purchase from a third-party supplier incorporated into much
10:06:58 larger products in this case with respect to the defendants.
10:07:01 And of course the patent is expired. It expired in 2020.
10:07:06 First, I will jump into the common allegations
10:07:12 that are at issue against both defendants. And these
10:07:18 allegations are kind of three major categories. Allegations
10:07:22 that the patent was well-known in the industry standards,
10:07:25 the IEEE standards organization and members of the IEEE
10:07:30 standards organization. Allegations that the patent was
10:07:34 discussed widely in published articles. And then the
10:07:38 defendants' participation in, I think they call it the
10:07:42 tight-nit market.
10:07:43 A couple of points there that I think are key
10:07:46 here. There is no allegation in the complaints that the
10:07:49 defendants were involved in the IEEE PoE standards
10:07:54 organizations. There is no allegation in the complaint that
10:07:58 the defendants manufacture or develop Power over Ethernet
10:08:02 chipsets. They acknowledge in the complaint that the

10:08:06 defendants purchased these chipsets from third parties.

10:08:10 And, of course, there is a lot of discussion
10:08:13 about Googling patents, Googling Network-1. There is no
10:08:18 allegation that the defendants actually did any of that.
10:08:20 You can Google any patent and Network-1 is not a competitor
10:08:24 of the defendants. So these are allegations that are
10:08:26 missing while there is a lot of discussion of hypotheticals,
10:08:31 there are conclusory statements about these things, but none
10:08:35 of them are plausible allegations that the defendants did
10:08:37 any of these things.

10:08:42 With respect to participation in the market,
10:08:45 there is case law that general participation in a relevant
10:08:48 market, that's not good enough. Here it's even more
10:08:51 attenuated because we're not in the Power over Ethernet
10:08:55 market. We make networking and security equipment. We're
10:09:01 not a PoE chipset provider. Even if allegations about
10:09:05 participation in the market were sufficient, they wouldn't
10:09:08 be in this case because that's not our market.

10:09:11 I won't walk through every one of these cases,
10:09:14 but the other piece to this that they alleged is that this
10:09:19 patent was widely litigated. As Your Honor knows with
10:09:23 patent infringement cases, that's not uncommon to have many,
10:09:26 many cases filed on a patent. But that's not good enough,
10:09:32 either. The case law says that it's not plausible to allege
10:09:35 that we would know about a specific patent from among

hundreds of patent cases filed. And I think they said they sued twenty-five or so defendants so far. Well, if it's a lawsuit against a PoE chipset maker, that's not even a competitor of ours. Of course I already mentioned Network-1 is not a competitor of ours. But it's not plausible and it's not a reasonable inference to infer that the defendants would monitor hundreds of lawsuits filed against all of these players in the network and security industry.

Cisco was one that was talked about in the complaints a lot and I did a quick search on Docket Navigator. From the time that Cisco was sued to the time the patent expired, there were 219 cases in district courts alone involving Cisco, patent cases. That's not even counting ITC cases, that's not counting appeals, Patent Office practices, 219 just for Cisco. It's simply not reasonable to infer that we would know about this single patent from among all of these competitor lawsuits.

And with respect to the PoE chipset manufacturers, they were involved in the standard organizations, therefore they knew about this patent. Well, that's not us. There is no allegation that any of the PoE chipset suppliers actually notified us. There is allegations that they knew about this, and there is speculation, or conclusory statements that, of course, they would tell other people about these patents, but none of the

10:11:14 allegations are specific to the defendant. The closest they
10:11:18 get is Microsemi, one of the PoE chipset providers or
10:11:24 manufacturers, I should say. They entered into a license to
10:11:29 the patent and there is an alleged obligation as part of
10:11:32 that license agreement to assist with notifying people about
10:11:36 this patent. They stopped short of alleging that Microsemi
10:11:43 ever notified the defendants and there is probably a good
10:11:46 reason --

10:11:46 THE COURT: How about you tell me about willful
10:11:49 blindness.

10:11:51 MR. DOTSON: Sure. Willful blindness here, the
10:11:59 standard as we know from *Global-Tech*, the defendant has to
10:12:02 subjectively believe there is a high probability that a fact
10:12:09 exists and they must take deliberate actions to avoid
10:12:13 learning of that fact.

10:12:14 What we have in the complaints is really just
10:12:17 a -- they must have been willfully blind. There is this
10:12:20 hypothetical that if we didn't know about the patents,
10:12:24 therefore we must have done all of these nefarious things,
10:12:28 instructing our employees to ignore it and bury their heads
10:12:32 in the sand. There is no allegation, no plausible
10:12:34 allegation at least that we actually did any of these
10:12:37 things.

10:12:37 So we have this sort of heads I win, tails you
10:12:41 lose argument, and that can't be right because otherwise

10:12:44 willful blindness always folds into itself and there is
10:12:48 always willful blindness. But when you look at the actual
10:12:51 allegations in terms of what are they saying that the
10:12:54 defendants actually did in terms of a well-pled fact, there
10:12:59 is nothing there for subjective belief of infringement or
10:13:03 deliberate actions to avoid learning of a patent from a
10:13:06 completely different industry than the defendants deal with
10:13:09 day-to-day.

10:13:10 And they talk about the *Global-Tech* case, they
10:13:13 try to analogize the *Global-Tech* case to this case. That
10:13:17 case is highly distinguishable. There you have a plaintiff
10:13:21 who purchased a product from overseas because they knew it
10:13:24 wouldn't be marked with a U.S. patent, they tore it down,
10:13:27 they copied it and they released it in the U.S. market. And
10:13:30 when they sought a right-to-use opinion from their lawyer,
10:13:34 they withheld all kinds of information about the fact that
10:13:37 A, they knew about the patent; and B, that they tore this
10:13:40 product down and copied it. So you have all kind of
10:13:43 nefarious activity there. That's not present here, and
10:13:46 there are not even any allegations that any of that occurred
10:13:49 here. So willful blindness just in terms of what's alleged
10:13:54 in the complaint, it doesn't get there. There is no willful
10:13:58 blindness here.

10:14:12 And going back to the general allegations, just
10:14:16 briefly, this idea that general due diligence in the

10:14:21 industry would require us to find this patent doesn't really
10:14:23 hold water either. Network-1 is not a competitor. We're
10:14:27 not in the PoE chipset industry. And PoE chipset
10:14:31 manufacturers aren't competitors. So this conclusory idea
10:14:34 that every competitor knows of another competitor's patents
10:14:38 and licenses in this case, if it's been licensed to them,
10:14:42 the case law just doesn't support that type of allegation.
10:14:47 To touch briefly on the unique allegations
10:14:53 against Fortinet, I'll talk about this a little bit. The
10:14:57 first one I want to touch on are the letters to Meru
10:15:01 Networks. They allegedly sent two letters to Meru Networks
10:15:04 which was ultimately acquired by Fortinet eleven years and
10:15:09 seven years before that acquisition. The allegations in the
10:15:14 complaint with respect to these letters don't pass muster.
10:15:18 There is no allegation that Meru had some sort of duty to
10:15:23 preserve these letters for seven years, much less that they
10:15:27 were actually transferred to Fortinet, much less that
10:15:30 Fortinet actually saw those letters and reviewed them, much
10:15:33 less that the allegations related to Meru products would
10:15:36 impute to subsequent Fortinet products.
10:15:40 And these letters, as far as I know, there is no
10:15:44 allegation that they ever led to litigation or licensing.
10:15:48 They could have been an afterthought.
10:15:51 THE COURT: But why isn't it enough that they
10:15:54 allege that and then they get some discovery and if it turns

out that none of that is true or nothing happened, that maybe it's a summary judgment issue. I take your point, this is -- this one is on the cusp for me, but if it's on the cusp and it's a motion to dismiss, I'm not sure that I can dismiss it.

Let's say they have these allegations and you say those allegations are insufficient, but you know, there is something, there is knowledge to a company that was acquired and maybe it's fair to impute that knowledge to Fortinet, maybe it's not, maybe those letters were never kept and Fortinet didn't have them and they're too old, but is this a motion to dismiss?

MR. DOTSON: Your Honor, we believe it is. To your point, when you look at the case law, there is not a lot that's analogous to this. The one that we did find, the *Olaf Soot Design* case in the willfulness context, but again, we're dealing with knowledge of a patent. It's a Southern District of New York case, but it held that plaintiff there likewise did not cite any law for the supposition that a purchasing company acquires the knowledge of a patent from the target company. It's just -- it's so far removed that the allegation is not plausible. And if that's all we have to stand on, there is not enough here to sustain an indirect infringement claim based on these pleadings.

So in the meantime, we spend hundreds of

thousands of dollars to get to summary judgment on an issue that wasn't well pled. And there is a line of argument kind of to this point in plaintiff's opposition that somehow we can add all these allegations together and it's good enough, but that kind of ignores the fact that the first step in this inquiry is we have to identify the well pled facts, things that aren't conclusory, things that aren't based on improper inferences, we have to do that first and then we decide whether it's plausible. We can't just add up a bunch of factual allegations, purported factual allegations that aren't well pled and somehow make that a well pled factual allegation to then get to possibility factor, so in line with this *Olaf Soot Design* case, if that's what we're left with, this allegation about Meru Networks, that's not going to be good enough to sustain at a motion to dismiss the indirect infringement claims here.

And again, there is no actual allegation that we ever saw these letters that's supported by any sort of factual basis.

The other point that's Fortinet specific, this notice from Microsemi that we touched on a little bit, they allege that Microsemi was licensed in 2008, reached out to its customers as part of an agreement to do so through 2008. The problem is, they even allege that Fortinet didn't begin introducing Power over Ethernet capable devices until 2010,

so it's not reasonable to infer that Fortinet would have been contacted by Microsemi and notified of this '930 patent.

And then employee knowledge with respect to Fortinet. I think the allegation is there are 500 employees that somehow would have known about this. There is nothing specific, they didn't identify any individual employee, much less how they would have known about this patent, much less how they would have imputed that to Fortinet. And I think the *Robocast* case here is instructive because there the general counsel of a prior company that was sued on the patent, went to another company, and even that wasn't good enough. They said there was no allegation that was supportable that he was involved in that specific litigation, so that's not going to satisfy the pleading standard there.

And I'll turn it over, unless Your Honor has any further questions, from me to Mr. Conrad, if that's okay.

THE COURT: Okay.

MR. CONRAD: Good morning, Your Honor. David Conrad on behalf of Ubiquiti. Very briefly just a very few points that are specific to Ubiquiti. This employee knowledge allegation, same for us, just different employees identified. And it's a similar analysis as well for Ubiquiti, that none of the allegations involve an employee

who had a reason to know about these patents, just that they happened to work at Cisco, for example, during the litigation. And as Your Honor knows, Cisco is made of thousands and thousands of employees and there is nothing particular about any kind of specialized knowledge.

The other unique allegations against Ubiquiti are even far more tenuous than what we've discussed so far. There was an allegation that Fish & Richardson, my firm, had some blog posts over the years that identified Network-1, and their litigation, and there is no identification what these posts are or how they can actually be connected to our client or our work for our client and it would be improper to impute that kind of knowledge from the law firm to the client. I did look up, try to see what these blog posts were and the only one I came across was just what we call a monthly round up of cases in the Northern District and Eastern District of Texas, one of them happened to mention this lawsuit. And the other specific allegation is that there were some posts on the community board which is where users and customers can post messages that mention other players in the marketplace, but none of them, none of the allegations actually suggest that this patent or Network-1 was actually involved or mentioned in those blog posts.

And so, Your Honor, that's it, the difference between the parties. I think to your point that why a

motion to dismiss here, just to remind the Court about what was said earlier, this patent is expired. It expired before this lawsuit. So this really is the case. If there is nothing here and they can't allege anything here based upon throwing the kitchen sink at it, right, all these different ways in which they try to say something must stick for there to be knowledge, that's why it matters at this stage.

THE COURT: I understand why it matters, I always understand why it matters because it's a big -- it's a different economic analysis, but that's not my issue. My issue is whether there is sufficient pleading to grant the motion. So I understand why it's brought. I'm not criticizing in any way why you brought this on a patent that expired a number of years ago and that is just coming out of the woods now, but that's not the issue that I'm looking at in trying to figure out whether the pleadings -- looking at it in the light most favorable to them whether there is -- whether they can make out a case.

MR. CONRAD: Thank you, Your Honor. And as we've seen, they're throwing the kitchen sink at it and we don't see anything there and we don't think these allegations can form a plausible complaint for indirect infringement.

Any other questions, Your Honor?

THE COURT: No. Thank you.

10:24:02 **MR. CONRAD: Thank you.**

10:24:05 **THE COURT: All right. So Mr. Farnan, just so we're clear, the patent is expired, right?**

10:24:10 **MR. FARNAN: Yes, Your Honor.**

10:24:10 **THE COURT: And no dispute that you're fine with granting the motion with regard to willfulness?**

10:24:16 **MR. FARNAN: Yes, Your Honor.**

10:24:17 **THE COURT: And Fish & Richardson, you're not really saying you can impute knowledge of all of their clients of anything that Fish & Richardson post on their web, right?**

10:24:26 **MR. FARNAN: No, Your Honor.**

10:24:27 **THE COURT: All right. So, go ahead.**

10:24:28 **MR. FARNAN: Your Honor, this motion is all about the factual allegations, and whether we can plausibly allege certain facts and not about evidence or proof. And what the defendants seem to say is that we must have evidence and proof at this stage which is not required.**

10:24:42 **As an example, Your Honor, if you look at Fortinet, with respect to Meru Networks, they have said that we should cite document retention policies. And that's just unheard of, Your Honor, for a complaint. No party will have document retention policy decided in the complaint. That's kind of evidence you are looking for and that's the kind of evidence you won't get. If you look at the cases it's**

10:25:04 **important to note that of the cases that were cited that**
10:25:07 **involve standard essential patents, there were two of them.**
10:25:09 **In those two cases that were cited by all the parties in the**
10:25:13 **briefs, the courts found that those cases have factual**
10:25:17 **allegations of knowledge to go forward because that's**
10:25:20 **important because the same standard essential patents mean**
10:25:24 **something and it's a different realm.**
10:25:25 **We also note that in *Elm*, every case must be**
10:25:29 **taken on their own merit, that's what the court said. And**
10:25:32 **the defendants have done a job in chopping up each**
10:25:35 **allegation and separating them and saying this allegation is**
10:25:38 **insufficient, this allege is insufficient. That's not what**
10:25:40 **the case law says. Look at *Elm*, take it as a whole. In**
10:25:45 ***SoftView*, the court when referencing AT&T filing false**
10:25:49 **allegations said take it as a whole. When you look at**
10:25:50 ***Soverain*, the court said take it as a whole. And that's**
10:25:52 **what we said in our briefing, you take it as a whole. With**
10:25:57 **all these allegations, we made a factual allegation that**
10:25:59 **there is knowledge by the defendants. That's what makes**
10:26:02 **this motion interesting for Your Honor, it's more of a gut**
10:26:05 **check, the cases are almost a wash, they can go either way,**
10:26:09 **it's what Your Honor feels, if we met the standard which is**
10:26:11 **factual allegations to show knowledge and we claim we have.**
10:26:15 **For Ubiquiti we claimed former employees that**
10:26:17 **are now at Ubiquiti that were at Cisco, three at Cisco and**

more than 3Com, that were there at the time that Fortinet asserted the patent.

THE COURT: Do you assert that those folks based on being at a company had reason to know of that litigation involved that patent?

MR. FARNAN: We do not have specific -- we do not have specific facts that say they knew that at the time, what we're saying is it's plausible given the notoriety of this patent, it's a crown jewel patent, Power over Ethernet.

THE COURT: But didn't you expect that you have something like -- who are these employees? Like, they're chief technical officer went there and so, you know, that person given his place in the hierarchy at the previous company of course would have known that that patent was being asserted. I mean, do you have anything that tells me more than just -- you know, I mean based saying some employees, it could be like the janitor who had no reason to understand that there was patent litigation let alone what that litigation was about.

MR. FARNAN: Sure.

THE COURT: So what am I supposed to do with some employees worked there and then they moved there, that doesn't seem like it gets you anywhere.

MR. FARNAN: Understood, Your Honor. What we have said in the complaint, it's an engineer, it's a product

manager, it is the vice-president of marketing, that's for Cisco. And they're not janitors, not low level employees. An engineer probably knows about this patent, if that engineer has any access into the Power over Ethernet realm. We also said for 3Comm it was a CEO and president. These are high level people. We're saying these high level people looking at this patent which is notorious in this industry would know about it, or most likely know about it, it's plausible they would know about it, and that's the standard.

For Fortinet we mentioned the Meru letters, and I understand think cited Olaf, but we're not saying as a matter of law just because a subsidiary is acquired that company is known, that company is charged with that knowledge, that's not what we're saying. We're saying if you do any due diligence as a company as most companies do and you look at Meru when acquiring it, Fortinet probably would have seen the litigation letter and said hey, we have these two litigation letters, that's what we're saying.

There is Microsemi, and just like the case, it was Coral Optical where when one of the suppliers says that they have given notice to their customers, then it's easy to infer that if that defendant is a customer, then they received that knowledge from Microsemi, that's what we're saying. That's our factual allegation. We can't prove it right now, but it's most likely that's a factual allegation

that we think we can prove.

THE COURT: Okay.

MR. FARNAN: And I mean, I can go through the other facts, Your Honor, but I feel like you may have heard enough. If there is any other questions.

THE COURT: Anything else you want to tell me is fine.

MR. FARNAN: The last thing I'll say, Your Honor, is the defendants are not saying that what we're saying is false, that it's not true, they're just saying that we haven't proven that they have the knowledge and that's the important distinction factor. No one can prove at this point that they have the knowledge, but they haven't come out and said this fact is not true or this is not true.

With that, Your Honor, nothing else.

THE COURT: All right. Thank you.

Rebuttal?

MR. CONRAD: Your Honor, David Conrad. Just briefly on the issue of employees, you asked about what kind of facts would matter. The case that was cited --

THE COURT: I know about the general counsel.

MR. CONRAD: It's general counsel, general counsel and CEO, so the fact that these are high level employees that are mentioned for us doesn't really matter. What may make sense if there was an employee that was a star

witness on the trial that showed up --

THE COURT: I guess my question is based on what's alleged, I mean, what if they say he was -- based on his position and working with products that were alleged, on information and belief he knew about them. I mean, clearly they don't know what was in his mind, but why isn't this a case where they get some discovery and they can find out did he have any knowledge of this?

MR. CONRAD: This is the best they can come up with. If there was -- if they could have found an employee who was a member of the standards organization that is responsible for this particular standard, and attended those meetings.

THE COURT: But he would know all of the defendants' employees, right?

MR. CONRAD: Well, they were able to come up with five -- actually eight different names and they could search through LinkedIn to come across all these different names and crosscheck them, and this is the best they can come up with. So it's not like there is knowledge hidden from them, this is all out there, they did their best and obviously it's not even getting close, not meeting any of the standards that the cases that we cited require there to be knowledge.

Thank you.

10:31:30 **MR. DOTSON: Dave Dotson. Just briefly, Your**
10:31:33 **Honor. Counsel mentioned two cases that dealt with industry**
10:31:36 **standards. I'm not exactly sure which cases those were. I**
10:31:41 **know one of them is a cellular communication case and**
10:31:45 **probably the other one as well, but the allegations were**
10:31:47 **because the defendants were involved in those standard**
10:31:50 **setting organizations, so it's a lot more plausible that if**
10:31:53 **you're involved in the standard setting organization, if the**
10:31:56 **patent is related to the standard, you might know about it.**
10:31:59 **Here there is no such allegation. We're not involved in the**
10:32:02 **standards for Power over Ethernet because we just buy that**
10:32:06 **solution from someone else.**
10:32:07 **And again, there was a discussion from opposing**
10:32:14 **counsel about well, we're asking them to prove their case.**
10:32:17 **Well, that's not what we're doing. What we're saying is**
10:32:20 **your allegations don't have facts, alleged facts in your**
10:32:25 **allegations to support your claims. It's not about proof.**
10:32:29 **And finally, this idea again that you can add up**
10:32:32 **all of these allegations that are not well pled facts,**
10:32:37 **that's not what *SoftView* stands for, that is not what**
10:32:43 ***Soverain* stands for. Those cases dealt with obviously**
10:32:46 **different facts in terms of patents being cited during**
10:32:49 **prosecution, and inventors of patents meeting with the**
10:32:55 **company, you had much more pinpoint facts in those**
10:33:01 **allegations that were pled. And while each of those**

10:33:05 1 **individually might not have been good enough for knowledge,**
10:33:09 2 **together they were okay.**
10:33:11 3 **Here we have facts that are not even well pled.**
10:33:14 4 **We have conclusory allegations that involve assertions, so**
10:33:17 5 **we don't even get to the plausibility point when you have**
10:33:20 6 **those types of allegations, that's the difference there.**
10:33:23 7 **Thank you, Your Honor.**
10:33:24 8 **THE COURT: All right. I have before me the**
10:33:33 9 **motion to dismiss in terms of willful and indirect**
10:33:36 10 **infringement. I'm going to grant the motion as to**
10:33:39 11 **willfulness. It's not opposed. And I will deny the claim**
10:33:43 12 **for inducement.**
10:33:43 13 **To state a claim for inducement, there must be**
10:33:46 14 **allegations of knowledge of the patent and knowledge of the**
10:33:49 15 **infringement. Here it is true that there are no allegations**
10:33:50 16 **that the current defendants knew of the patent directly.**
10:33:53 17 **There are, however, allegations at least for Fortinet, the**
10:33:56 18 **predecessor, was sent letters and had knowledge as well as**
10:34:00 19 **for both defendants pages and pages of the allegations about**
10:34:03 20 **the publicity surrounding the patent and the purported issue**
10:34:08 21 **and the defendants knew that their products were using that**
10:34:10 22 **standard.**
10:34:11 23 **Look, I see that this is a very close call, but**
10:34:14 24 **there are some unique facts in this case, including that we**
10:34:17 25 **have a patent involving a standard that was well publicized**

10:34:20 and well-known, and I do take plaintiff's point that much of
10:34:24 defendants' arguments suggest that there is a lack of proof
10:34:28 rather than a lack of factual allegations from which I can
10:34:32 draw a reasonable inferences. And we don't simply have just
10:34:39 a bunch of conclusory allegations here, these have some
10:34:44 weight to them. And so as I said, I think it's a close
10:34:51 call. I think in the context of a motion to dismiss, that
10:34:55 supports denying the motion. So that's my ruling.
10:34:58 With that being said, I am sensitive to
10:35:01 defendants' concerns about the costs of discovery, so is
10:35:06 this something where we can bifurcate discovery and see if
10:35:10 after discovery is bifurcated summary judgment motions are
10:35:15 appropriate?
10:35:24 MR. CONRAD: Your Honor, on behalf of Ubiquiti,
10:35:27 I think it's something that we should discuss. There is
10:35:31 this knowledge issue and there is also a marking issue both
10:35:33 of which may be dispositive to this, at least almost
10:35:38 entirely or in full.
10:35:39 THE COURT: I'm not agreeing, I don't usually
10:35:42 agree that you can have an early summary judgment, so don't
10:35:46 count on it, but I am willing to let you guys go back and
10:35:50 discuss what makes sense in the context of moving this case
10:35:54 forward, particularly given this issue. I mean, I think
10:35:58 it's fair to give the plaintiff some ability to see if there
10:36:03 is anything to the potentially -- or to the reasonable

10:36:08 inferences that I can draw from their allegations.

10:36:12 So why don't you go back and talk about that.

10:36:15 I'm not agreeing you can suddenly start bringing in marking

10:36:19 and every other early summary judgment because in my

10:36:22 experience that just winds up with me dealing with cases for

10:36:27 ten years instead of three when they come back repeatedly

10:36:30 after appeals. So go talk about whether there is some

10:36:35 reasonable way of bifurcating discovery on the inducement

10:36:39 issues and the knowledge of the patent and knowledge of

10:36:43 infringement. And then if you guys can come to an

10:36:48 agreement, great, if not, I guess we'll have to meet again.

10:36:52 But if you can, then after that you can give me a schedule.

10:36:58 I am not going to agree that you can file motions for

10:37:01 summary judgment, but you can submit a three, four-page

10:37:05 letter telling me why you think that there are no genuine

10:37:09 issues of material fact that would allow me to grant such a

10:37:14 motion and that it wouldn't be just a waste of my time.

10:37:17 MR. CONRAD: Okay. Thank you, Your Honor.

10:37:18 THE COURT: Anything you want to add,

10:37:20 Mr. Farnan?

10:37:20 MR. FARNAN: No, Your Honor. Thank you.

10:37:22 THE COURT: So you guys can go back and talk

10:37:24 about that. And why don't you take -- see where you can get

10:37:28 in the next week or so, and let us know with a status report

10:37:35 whether you have come to an agreement, if you have a

10:37:38 **schedule for doing that, et cetera. All right?**

10:37:41 **All right, everyone, have a good weekend.**

10:37:44 **COURT CLERK: All rise. Court is adjourned.**

(Court adjourned at 10:37 a.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Dale C. Hawkins
Official Court Reporter
U.S. District Court